

ATTORNEY FOR APPELLANT

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JURISDICTIONAL STATEMENT

Appellant Natalie DePriest adopts the jurisdictional statement set out in Appellant's Substitute Brief and Argument, filed on March 22, 2016.

STATEMENT OF FACTS

Appellant Natalie DePriest adopts the statement of facts set out in Appellant's Substitute Brief and Argument, filed on March 22, 2016. Natalie will cite to the record on appeal as follows: Legal File, "(L.F.)"; Appellant's Brief, "(App. Br.)"; and, Respondent's Brief, "(Resp. Br.)."

REPLY ARGUMENT – I.¹

In its brief, Respondent argued that Natalie “did not allege facts showing that counsel labored under an actual conflict of interests that adversely affected counsel’s performance and thereby deprived her of some benefit” (Resp. Br. 24). Respondent acknowledged that Natalie alleged in her amended motion that counsel’s joint representation of her and her brother resulted in her continual receipt of package plea offers, and hampered counsel’s ability to effectively negotiate for, and counsel her on the advisability of accepting, a more favorable plea offer than the one to which she ultimately pleaded guilty or going to trial (Resp. Br. 24-25, 32-33, 35-38).

But Respondent argued that these factual allegations were insufficient to show an adverse effect (Resp. Br. 24-27, 29-32, 38). Respondent argued that the State would have made a package plea offer, even had separate counsel

¹ Natalie has chosen to specifically respond to Respondent’s arguments regarding Points I, II, and III of Natalie’s brief, and does not waive any remaining points or arguments included within Appellant’s Substitute Brief and Argument, filed on March 22, 2016.

represented Natalie and her brother, David (Resp. Br. 25, 35). Respondent further argued that Natalie did not allege that a more favorable plea offer contemplating her testimony against David was made, that counsel advised her not to testify against David, or that counsel steered her toward the offer (Resp. Br. 25, 38).

In making its argument, Respondent suggests that Natalie's allegations are purely speculative and not based on facts about what counsel did or failed to do (Resp. Br. 37-38, 42). In her pleadings, however, Natalie did not, as Respondent suggests, just allege what counsel could not do due to the conflict of interest, or what counsel hypothetically would have done if the conflict of interest had not existed.

Natalie alleged not only that counsel "was unable" to provide her with honest advice and vigorous advocacy about what would benefit *only* her, but also that counsel failed to provide that advice. Natalie alleged that "counsel never discussed a strategy about her case alone" (L.F. 44). She alleged that counsel "only discussed what was good for her and David together" (L.F. 44).

Natalie further alleged that counsel "was unable to use David's vulnerability and culpability as leverage to secure a relatively favorable outcome for Natalie due to his concurrent duty of loyalty to David" (L.F. 41). This

allegation is far from speculative and supported by a record showing that counsel did not obtain Natalie a favorable outcome relative to David. The record shows that for her plea, Natalie, who was less culpable than David, received a term of imprisonment of 15 years – the same term of years that David received for the same offenses (i.e., Counts I and II) (Tr. 76-77; L.F. 38).

Respondent in its brief suggests that a better plea offer for Natalie simply was not possible. Respondent touts counsel's efforts to obtain a better plea offer for Natalie and states that "[t]he fact that the State refused to make a better offer to Ms. DePriest was not caused by any alleged conflict of interest" (Resp. Br. 34-35).

Respondent overlooks, however, that the State made better plea offers to Natalie than the plea offer to which she pleaded guilty, but that counsel advised her to refuse them. The State offered both Natalie and David a 10-year sentence, pursuant to § 559.115, which counsel advised them to refuse (L.F. 34). The State additionally offered both Natalie and David a 15-year sentence, pursuant to § 559.115, which Natalie again refused pursuant to counsel's advice (L.F. 35-36).

Both of these plea offers, though package plea offers, would have resulted in Natalie spending less time incarcerated and each offered Natalie the opportunity for release on probation within 120 days of her incarceration. §

559.115.3 Cum. Supp. 2010. But counsel advised Natalie not to accept these more favorable plea offers (L.F. 35-36).

There is a reasonable probability that, but for counsel's joint representation of Natalie and David, Natalie would have obtained a more favorable outcome for her plea. Natalie alleged that "a reasonably competent lawyer representing only [her] . . . may have advised her . . . that it would be in her best interest to distance herself from her more culpable codefendant [, David]" and even offer to testify against him in exchange for a more favorable disposition (L.F. 42).

Notwithstanding, Natalie's amended motion allegations indicate that counsel did not provide Natalie with any such advice, even though the State was planning to extend just such an offer (*see* L.F. 38, 44). In her amended motion, Natalie alleged the prosecutor told counsel that he intended to extend a plea offer to Natalie in exchange for Natalie's testimony against David if Natalie refused a plea offer for 15 years pursuant to § 559.115 (L.F. 36).

That the prosecutor announced his intention to extend this plea offer to Natalie indicated that, contrary to Respondent's arguments, the State was contemplating extending, and might have decided to extend, offers that were not part of package plea deals. That nothing on record shows that counsel ever attempted to negotiate a favorable plea deal for Natalie's testimony against

David, even after the prosecutor announced an intention to offer such a deal, indicates that counsel had divided loyalties.

The amended motion allegations further indicate that even as the prosecutor stated his intentions to extend a plea offer to Natalie to testify against David, he expressed his expectation that counsel would reject the offer (L.F. 36). In her amended motion, Natalie alleged the prosecutor told counsel that while counsel “may assert that [Natalie] does not wish” to accept the offer or to testify against David, the prosecutor himself would move to disqualify counsel because counsel would not be able to successfully represent Natalie’s and David’s interests (L.F. 36). In so stating, the prosecutor acknowledged what counsel had unreasonably failed to recognize – that counsel had an actual conflict of interest.

Respondent in its brief argues that any alleged conflict of interest did not adversely affect counsel’s conduct because there is no allegation that a favorable plea offer contemplating Natalie’s testimony against David was actually made, that counsel advised her not to testify against David, or that counsel steered Natalie toward the disastrous plea offer to which Natalie pleaded guilty (Resp. Br. 25, 38).

Respondent’s argument ignores Natalie’s allegation that counsel “negotiated” the package plea agreement to which Natalie pleaded guilty, and

that Natalie pleaded guilty “pursuant to this agreement, but otherwise ‘open’ . . . based on the advice of counsel” (L.F. 38).

The package plea agreement that counsel negotiated was only valid if both Natalie and David pleaded guilty, and consequently, by its very nature, the offer raised the risk that coercion would result in Natalie entering an involuntary plea of guilty.² The negotiated package plea agreement raised the risks that Natalie’s codefendant and brother, David, other family members, or counsel would coerce Natalie to involuntarily plead guilty and sacrifice her own best interests for her

² “[A] prosecutor’s offer during plea bargaining of adverse or lenient treatment for some person other than the accused might pose a greater danger of inducing a false guilty plea by skewing the risks a defendant must consider.” *Bordekircher v. Hayes*, 434 U.S. 357, 364 (1978). This concern applies to package plea offers because, “[q]uite possibly, one defendant will be happier with the package deal than his codefendant(s); looking out for his own best interests, the lucky one may try to force his codefendant(s) into going along with the deal.” *United States v. Caro*, 997 F.2d 657, 659-60 (9th Cir. 1993).

more culpable brother, who, in contrast to Natalie, would fare better with a guilty plea than at trial (*see* App. Br. 39-41; L.F. 31-32, 40-42).

Respondent ignores that counsel played so active a part in Natalie's acceptance of such a coercive package plea agreement. Counsel advised Natalie – whom counsel stated numerous times was not guilty of felonious activity, could not be proven guilty at trial, and should receive a SIS – to plead guilty pursuant to a negotiated package plea agreement that was less favorable than prior plea offers that counsel had advised Natalie to refuse (L.F. 35-37, 38, 40). Prior package plea offers at least offered an agreed upon term of years and the possibility of release on probation, but the negotiated package plea agreement to which Natalie pleaded guilty was for an open plea that subjected her to the full range of punishment for the charged offenses (Tr. 48; L.F. 38). Counsel steered Natalie toward this disastrous plea offer by negotiating it and advising her to accept it, and counsel's action of doing so was just one more way in which counsel's representation actually prejudiced Natalie (L.F. 38).

Notably, Natalie is not required to show that counsel's performance actually prejudiced the outcome of her criminal proceedings. *Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980). Natalie does not have to allege, as Respondent suggests, that a more favorable plea offer contemplating her testimony against

David was made, or that counsel advised her not to testify against David (Resp. Br. 25, 38). Prejudice is presumed because Natalie has alleged facts showing that counsel labored under an actual conflict of interests affecting counsel's performance. *Id.*; *Conger v. State*, 356 S.W.3d 217, 221 (Mo. App. E.D. 2011).

Conclusion

Consequently, this Court should find that the motion court erred in denying Natalie's Rule 24.035 motion because Natalie pleaded facts, not conclusions, that the record does not refute, and which warrant a hearing and post-conviction relief.

Natalie alleged that counsel was ineffective for representing Natalie while laboring under an actual conflict of interest that adversely affected his performance, and prejudiced Natalie (L.F. 31-45). Specifically, counsel failed to provide honest advice and vigorous advocacy about what would benefit only Natalie: "counsel never discussed a strategy about her case alone" and "only discussed what was good for her and David together" (L.F. 44).

Counsel did not use David's vulnerability and culpability as leverage to secure a relatively favorable outcome for Natalie (L.F. 41). Nothing on record shows that counsel ever attempted to negotiate a favorable plea deal for

Natalie's testimony against David, even after the prosecutor announced an intention to offer such a deal.

Instead, counsel advised Natalie to refuse package plea offers for an agreed upon term of years and the possibility of release on probation, negotiated a coercive package plea agreement for an open plea, and advised Natalie to accept that agreement (L.F. 35-36, 38). Natalie's acceptance of that agreement resulted in Natalie's receipt of a relatively harsh term of imprisonment of 15 years with no possibility of probation, an outcome that was disproportionate to her culpability and less favorable than she might otherwise have received.

In sum, counsel's ineffectiveness deprived Natalie of her right to conflict-free, effective counsel, right to due process, right against self-incrimination, right to persist in her plea of not guilty, and right to jury trial as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and Article I, §§ 10, 18(a), 19, and 22(a) of the Missouri Constitution. This Court must reverse the motion court's judgment and vacate Natalie's plea, or in the alternative, remand for an evidentiary hearing on this claim.

REPLY ARGUMENT - II.

Respondent in its brief argues that Natalie failed to allege facts showing a violation of Rule 24.02 (Resp. Br. 45-46). Respondent argues that Natalie failed to allege facts showing a “causal relationship between the ‘group plea’ procedure . . . and the lack of questioning about the alleged conflict of interest” (Resp. Br. 46). Respondent additionally argues Natalie did not allege facts showing that the group plea procedure failed to satisfy the constitutional requirement that her plea be voluntary, that she would not have pleaded guilty but for use of the group plea procedure, or that the court would have been alerted to the conflict of interest but for use of the group plea procedure (Resp. Br. 49-50).

Respondent’s argument ignores Natalie’s amended motion allegations (L.F. 58). Natalie alleged facts showing a causal relationship between the group plea procedure and the court’s failure to inquire into the alleged conflict of interest. In her amended motion, Natalie alleged that due to use of the group plea procedure, it was less likely that the court would inquire about the conflict and take adequate steps to ascertain whether the conflict warranted separate counsel (L.F. 58). She noted that the “court asked Natalie and David about their representation by [counsel] using the same standard questions” for them as it did

for the other defendants standing in line, and never asked about Natalie's and David's dual representation by the same counsel (L.F. 58).

Natalie additionally alleged that but for the use of the group plea procedure, the court would have been alerted to the conflict of interest. In her amended motion, Natalie alleged that there is a reasonable likelihood that the court would have discovered "at least some of the facts" about the conflict of interest, and once alerted to the conflict, would have ordered separate counsel, or at a minimum, would have delayed the plea proceedings (L.F. 58). She specifically alleged that had the court asked whether there were any plea offers in Natalie's case, the answers to that question might have alerted the court to the conflict of interest (L.F. 58-59).

Natalie's allegations are adequate. They sufficiently plead facts, not conclusions, which the record does not refute and that entitle Natalie to relief based on the court's use of the group plea procedure.

Respondent argues the contrary and further states that there is no reasonable probability that but for the use of the group plea procedure, the court would have been alerted to the conflict of interest (Resp. Br. 47). Respondent states that "[w]hether questioning Ms. DePriest alone or in the presence of other defendants, there is no reasonable probability that the plea court would have

asked different questions in accepting her plea” because the court must follow Rule 24.02, which does not require the court to inquire about dual representation (Resp. Br. 47).

Rule 24.02, however, “does not mandate a strict procedure or ritual that a court must follow” in accepting a plea. *Johnson v. State*, 962 S.W.2d 892, 895 (Mo. App. E.D. 1998). Its requirements and procedures do not constitute an “unalterable script” to which the court must adhere. *Steinle v. State*, 861 S.W.2d 141, 143 (Mo. App. W.D. 1993). It limits neither the number nor type of questions that the court can ask before accepting a plea. Rule 24.02. Consequently, it is permissible for a court to make additional inquiries not specifically required by Rule 24.02 before accepting a plea.

Moreover, it is reasonably probable that but for the court’s use of the group plea procedure in this case, the court would have inquired about the conflict of interest. Natalie, David, and even counsel disclosed counsel’s dual representation of codefendants, Natalie and David, when responding to the court’s inquiries at the plea (Tr. 6-7, 11, 48-49). Then, counsel later disclosed the negotiated package plea agreement, the acceptance of which was contingent on Natalie and David both pleading guilty (Tr. 48).

The disclosure of counsel's joint representation of two codefendants alone would have alerted the court to the possibility of a conflict of interest, and under ordinary circumstances, not involving a group plea setting, would likely have prompted at least a cursory inquiry into conflicts of interest or waiver. Due to the group plea setting utilized in this case, however, it did not.

The use of the group plea procedure prejudiced Natalie. Respondent argues that Natalie did not sufficiently plead prejudice in her amended motion because she did not plead that she would not have pleaded guilty but for the use of the group plea procedure (Resp. Br. 49-50).

Natalie acknowledges that she did not specifically allege in her amended motion that she would not have pleaded guilty but for the use of the group plea procedure. She asserts, however, that she sufficiently pleaded prejudice by alleging that but for the use of the group plea procedure, the outcome would have been different. In addition to alleging that the court would have been alerted to the conflict of interest and would have taken action, Natalie alleged that the "bad outcome [for Natalie]" would have been avoided by use of an individualized plea procedure (L.F. 58-59).

The "bad outcome" was most obviously the plea that resulted in a total 15-year sentence, and Natalie pleaded that "a more thorough and individual plea

procedure would likely have revealed the problems in this case that led to the bad outcome for Natalie” (L.F. 59). She pleaded that “there is a reasonable likelihood [that] . . . “at a minimum [the court] would not have accepted the guilty plea at that time” (L.F. 58).

While Natalie did not, in her pleadings, use exact words stating that she would not have pleaded guilty but for use of the group plea procedure, in the context of her case, her pleadings can only be interpreted to mean just that. There is no outcome, other than her plea, to which Natalie could reasonably have been referring. For this reason, this Court should find Natalie’s pleadings sufficient.

On analogous facts, the Western District in *Patterson v. State*, 92 S.W.3d 212, 215 (Mo. App. W.D. 2002) held the movant’s pleading of his claim of ineffective assistance of counsel was adequate. There, the movant, Patterson, pleaded that had he “been given accurate information about his sentence, there is a reasonable probability that the outcome of the proceedings would have been different.” *Patterson*, 92 S.W.3d at 215. But Patterson did not plead that ““but for’ his attorney’s actions, he would have gone to trial” and the State pointed out the omission on appeal. *Id.*

In reaching its holding, the Western District noted that Patterson's assertion – that there is a reasonable probability that the outcome of the proceedings would have been different – “cannot mean anything other than but for counsel's deficiency, Patterson would have rejected the plea opportunity and chosen to go to trial.” *Id.* at 215. The Western District could “not think of any sense in which the outcome could have been different apart from a decision to go to trial,” and for that reason, the Western District construed the pleading as adequate. *Id.*

For similar reasons, this Court should hold Natalie's pleadings are adequate. Natalie pleaded facts demonstrating that the use of the group plea procedure prejudiced her. *Cf. Bauer v. State*, 926 S.W.2d 188, 191 (Mo. App. S.D. 1996) (holding no evidentiary hearing warranted where movant made no allegation of prejudice from court's failure to follow Rule 24.02). This Court must reverse the motion court's judgment and vacate Natalie's plea, or in the alternative, remand for an evidentiary hearing.

REPLY ARGUMENT - III.

Respondent argues that by failing to challenge the constitutionality of § 195.017 at the earliest opportunity, before pleading guilty, Natalie waived her claim (Resp. Br. 54-55).

Natalie acknowledges that the general rule in Missouri is that a knowing and voluntary guilty plea waives all nonjurisdictional defects, including statutory and constitutional guarantees. *Feldhaus v. State*, 311 S.W.3d 802, 804 (Mo. banc 2010); *see also* *Garris v. State*, 389 S.W.3d 648, 651 (Mo. banc 2012).

“An exception to this general rule of waiver, however, exists where it can be determined *on the face of the record* that the court had no power to enter the conviction or impose the sentence.” *Hagan v. State*, 836 S.W.2d 459, 461 (Mo. banc 1992) (citing *United States v. Broce*, 488 U.S. 563, 569 (1989)).³

Moreover, “Rule 24.035 creates an exception to the general rule that a plea of guilty waives the right to challenge alleged error relating to the plea and sentence.” *State v. Hopkins*, 432 S.W.3d 208, 211 (Mo. App. W.D. 2014).

³ *Hagan* was overruled on other grounds in *State v. Heslop*, 842 S.W.2d 72 (Mo. banc 1992).

Natalie raises her claim under these stated exceptions. “A person convicted of a felony on a plea of guilty and delivered to the custody of the department of corrections who claims that the conviction or sentence imposed violates the constitution and laws of this state or the constitution of the United States, including claims of ineffective assistance of trial and appellate counsel, that the court imposing the sentence was without jurisdiction to do so, or that the sentence imposed was in excess of the maximum sentence authorized by law may seek relief in the sentencing court pursuant to the provisions of this Rule 24.035.” Rule 24.035(a).

Natalie is seeking relief under Rule 24.035 on the basis of one of the claims enumerated by rule (L.F. 45-55). “The claims enumerated in Rule 24.035 include both constitutional challenges and jurisdictional challenges, and the rule mandates that these claims be presented in the motion for relief.” *Carter v. State*, 215 S.W.3d 206, 211 (Mo. App. E.D. 2006). Natalie properly raised her claim – that her conviction and sentence violates the laws or constitution of this state or the constitution of the United States – in her amended motion (L.F. 45-55). Consequently, Natalie’s claim is cognizable and was not waived. This Court must reverse the motion court’s judgment and vacate Natalie’s plea, or in the alternative, remand for an evidentiary hearing.

CONCLUSION

WHEREFORE, based on her arguments in Points I through IV of her substitute brief and Points I and II of her substitute reply brief, Appellant Natalie DePriest respectfully requests that this Court reverse the motion court's judgment and vacate Natalie's plea, or in the alternative, remand for an evidentiary hearing.

Respectfully submitted,

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CERTIFICATES OF SERVICE AND COMPLIANCE

Pursuant to Missouri Supreme Court Rules 84.06(g) and 83.08(c), I certify that a copy of this brief was served via the Court's electronic filing system to Shaun Mackelprang of the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102 at Shaun.Mackelprang@ago.mo.gov on **Friday, April 29, 2016**. In addition, pursuant to Missouri Supreme Court Rule 84.06(c), I certify that this brief includes the information required by Rule 55.03 and that it complies with the word count limitations of Rule 84.06(b). This brief was prepared with Microsoft Word for Windows, using Book Antiqua 13-point font. The word-processing software identified that this brief contains 4,011 words.

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